PARKER POE

PARKER POE ADAMS & BERNSTEIN L.L.P.

Attorneys and Counselors at Law

Henry C. Campen
Partner
Telephone: 919.890.4145
Direct Fax: 919.835.4536
henrycampen@parkerpoe.com

First Union Capitol Center
150 Fayetteville Street Mall
Suite 1400
Post Office Box 389
Raleigh, NC 27602-0389
Telephone 919.828.0564
Fax 919.834.4564
www.parkerpoe.com

October 16, 2002

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Notice Ex Parte Meeting. Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, FCC 01-361 ("Triennial Review" or "NPRM").

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, this letter will provide notice that on October 15, 2002, Lin Altamura, Associate General Counsel for Duke Energy; Tony Cockerham, Director-Network Planning for DukeNet Communications LLC ("DukeNet") and the undersigned counsel for DukeNet met with Jordan Goldstein to discuss regulatory issues relating to the above- referenced dockets.

DukeNet, a Delaware limited liability company formed in 1994, is a wholly owned telecommunications subsidiary of Duke Energy Corporation, a diversified multinational energy company. DukeNet is a facility-based carriers' carrier that provides long haul and metro bandwidth capacity and collocation services to telecommunication providers. Its customers include incumbent local exchange carriers ("ILECs"), competing retail local exchange carriers ("CLECs"), Internet Service Providers ("ISPs"), interexchange carriers and commercial mobile radio service ("CMRS") carriers. DukeNet is based in Charlotte, North Carolina and currently operates a fiber network that links major metropolitan centers of North Carolina, South Carolina, Georgia and Florida. DukeNet is continuing to work to expand its footprint to cover other states in the Southeast

NPRM Question Addressed/DukeNet's Objectives

The purpose of our meeting was to address the question raised by the Commission in paragraph 37 of the NPRM: whether unbundling requirements should turn on the types of services the requesting carrier seeks to offer. DukeNet's objectives for the meeting were (1) ensure access by CLECs to unbundled network elements ("UNEs") for provision of any telecommunications service without restriction; (2) ensure CLEC access to a broad list of UNEs; (3) ensure that DukeNet can order qualifying facilities as UNEs; and, (4) to ensure clear answers to these questions emerge from the Triennial Review so as to provide regulatory certainty.

DukeNet's Network

Included as Attachment A is a map of DukeNet's network based in the Carolinas and extending to 21 cities in 4 states. DukeNet operates a dense wavelength division multiplexed synchronous optical network comprised of 25,000 fiber miles and 2000 route miles of fiber. Across its network, DukeNet has installed 120 on-net points of presence ("POPs") and has collocation facilities in 40 ILEC central offices ("C/Os"). DukeNet's investment in this network is well in excess of $50,000,000. However, DukeNet needs access to a broad array of UNEs to penetrate the wholesale local exchange market and effectively compete with the ILECs.

As noted above, DukeNet is a wholesale carrier and carries traffic for all types of retail telecommunications providers. The principal focus of this meeting was carriage of traffic of CMRS carriers. CMRS traffic constitutes approximately 1/3rd of DukeNet's traffic. Included as Attachment B is a diagram depicting DukeNet's use of its infrastructure and UNEs to service CMRS carriers. Following is a description of the services DukeNet provides to CMRS carriers:

- Mobile Switching Centers ("MSCs") - DukeNet carries traffic between CMRS switches. DukeNet has built fiber to 15 of the 30 MSCs in DukeNet's target market. DukeNet needs dark fiber transport or dedicated transport UNEs from ILEC C/Os to access the remaining MSCs in its target market. Transport UNEs are also necessary to provide route diversity to MSCs to which DukeNet has built its own fiber.

- Cell Sites – DukeNet carries traffic from cell sites to switches and from cell sites to aggregation sites or hubs and, in turn, from hubs to MSCs. DukeNet has built fiber to a small number of these sites in its target market. Because of the restraint on capital for telecommunications, DukeNet serves these sites primarily through purchase of special access circuits. DukeNet needs access to UNE DS1 loops to compete with ILECs for this traffic. Special access circuits are 40-75% more expensive than UNE loops.

ILECs have denied DukeNet access to UNEs necessary to provide the service described above on the basis that UNEs may not be used to service CMRS traffic.

Use Restrictions Are Unlawful Under the Act and FCC Decisions.

Use restrictions on services offered over UNEs are contrary to the plain language of the Act. Section 251(c)(3) states that ILECs must provide, to "any requesting telecommunications carrier" access to "network elements on an unbundled basis" for the provision of "a telecommunications service."

The Act's very broad definition of a network element in Section 153(29) would have to be significantly modified to support a use restriction. The FCC expressly rejected such restrictions in the *Local Competition Order*. "[S]ection 251(c)(3) does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled network elements." *Local Competition Order*, ¶ 264. This view was later codified in the Commission's Interconnection rules as an express prohibition on any such limitations. ILECs "shall not impose limitations, restrictions, or requirements on requests for, or the use of, [UNEs] that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends." 47 C.F.R. § 51.309(a). The FCC should reaffirm in the Triennial Review Congress' clear intention not to permit any use restrictions on UNEs.

Use Restrictions Will Impede Development of Local Competition.

CMRS carriers rely to an overwhelming degree on ILEC facilities for transport and for last mile connectivity. *See* Comments of Voicestream Wireless Corporation at 15. Ironically, ILECs have a monopoly in the provision of facilities to CMRS carriers who, in turn, are perhaps the most formidable threat to the ILECs local exchange monopoly. Wholesale CLECs such as DukeNet have built facilities to compete with ILECs for CMRS carrier business. These facilities carry traffic among MSCs and from wireless hubs and cell sites to MSCs.

Wholesale CLECs need access to UNEs to provide route diversity/redundancy for sites to which CLECs already have fiber and to provide access to sites to which construction cannot be justified. It is simply not economically feasible for wholesale CLECs to duplicate the ILEC fiber networks. Use restrictions would deny CLECs access to existing dark fiber placed by ILECs to service CMRS carriers. Dark fiber is not available through ILEC special access tariffs.

With use restrictions, the ILEC monopoly over CMRS carriers will be preserved. A primary competitor for ILEC local exchange business will be denied alternatives to help it compete. Without use restrictions, wholesale CLECs can compete with ILECs for CMRS business and promote local competition through an intermodal provider.

The Absence of Use Restrictions Will Promote Facilities-Based Competition.

DukeNet and other wholesale CLECs have made substantial investments in their own networks. DukeNet has invested well in excess of $50,000,000 in 25,000 of miles fiber, 120 on-net POPs, and 40 collocations. The status of capital markets and the telecom sector has restricted DukeNet's access to capital for construction of new fiber routes. While less capital intensive than fiber construction, adding electronics to dark fiber represents a significant capital investment. This level of investment is more readily justified in the present market. DukeNet's record of investment and its wholesale business model demonstrate DukeNet's commitment to facilities-based competition.

CLECs Should Have Access to a Broad List of UNEs.

Access to a broad array of UNEs is necessary to promote competition in the wholesale market in which DukeNet operates. Carrier customers expect network redundancy in the event of failures. Even where DukeNet has its own fiber facilities, it often needs UNEs to meet the market demand for route diversity and redundancy. Wholesale CLECs cannot compete effectively with ILECs without the redundancy that carrier customers expect. UNEs are also used to fill in gaps in DukeNet's network. The ubiquity of the ILEC last mile facilities cannot be matched by any competitor and must be supplied by access to UNEs.

DukeNet Should Be Able to Order Qualifying Facilities as UNEs.

ILECs have invented use restrictions for which there is no legal basis to deny CLECs access to UNEs to serve CMRS carriers. However, they have also argued that the circuits CLECs have tried to order are not UNEs. DukeNet believes that the following facilities are UNEs to which it is entitled under the Act. DukeNet wants to ensure through the Triennial Review that DukeNet has access to these UNEs.

Dark Fiber Transport. DukeNet is entitled to unbundled access to dark fiber from its collocation in the serving wire center serving a CMRS site to its POP at the site at UNE prices. Dark fiber transport is defined as "incumbent LEC optical transmission facilities without attached multiplexing, aggregation or other electronics." Section 51.319(d)(1)(ii). The Interconnection Rules also require the ILEC to "permit, to the extent technically feasible, a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunications carrier, including, but not limited to, the requesting carrier's collocated facilities." Section 51.319(d)(2)(iii). DukeNet can designate its POP as the terminal for the dark fiber. The facility described here is unbundled dark fiber and should be provided to DukeNet under the Act.

Local Loop. DukeNet is entitled to unbundled access at UNE prices to the loop facility from DukeNet's collocation in the serving wire center serving a cell site to the DukeNet POP or other demarcation point at the site. The Interconnection Rules define the local loop as the "transmission facility between a distribution frame … in an [ILEC] central

office and the loop demarcation point at the end-user customer premises . . . ." Section 51.319(a)(1). If DukeNet has a POP at a cell site, it may serve as the demarcation point. The POP is the functional equivalent of a network interface device typically associated with a local loop. The POP or other demarcation point is located at the CMRS carrier's premises, and the CMRS carrier is the end-user of DukeNet's wholesale service. The facility DukeNet wants to order is an unbundled local loop and should be provided under the Act.

Dedicated Transport. Under the Act, DukeNet should have unbundled access to dedicated transport between an ILEC central office or serving wire center and a DukeNet CMRS customer's switch or cell site. The Interconnection Rules define dedicated transport as "[ILEC] transmission facilities . . . dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by [ILECs] or requesting telecommunications carriers, or between switches owned by [ILECs] or requesting telecommunications carriers . . . ." Section 51.319(d)(1).

The circuit between an ILEC central office or serving wire center and a DukeNet CMRS customer's switch or cell site meets this definition. The circuit is dedicated to particular customer or carrier –DukeNet's CMRS carrier customer. The circuit is owned by the ILEC. It connects an ILEC C/O or serving wire center with an MSC. DukeNet subscribes to the arguments of Progress Telecom and others that a cell site performs switching functions. See Comments of Progress Telecom at 9. However, to the extent the FCC believes the definition needs to be broadened to encompass cell sites, the definition should be so modified.

Need for Regulatory Certainty.

The present uncertainly over access to UNEs presents a major obstacle to the continued development of wholesale competition in the local exchange market. Commitment of even the limited resources now available for facilities to compete with ILECs in this market is severely inhibited by the lack of clarity over ILEC obligations. DukeNet believes that the FCC must remove this uncertainty in its Order in the Triennial Review for competition to have a chance in the wholesale or retail markets.

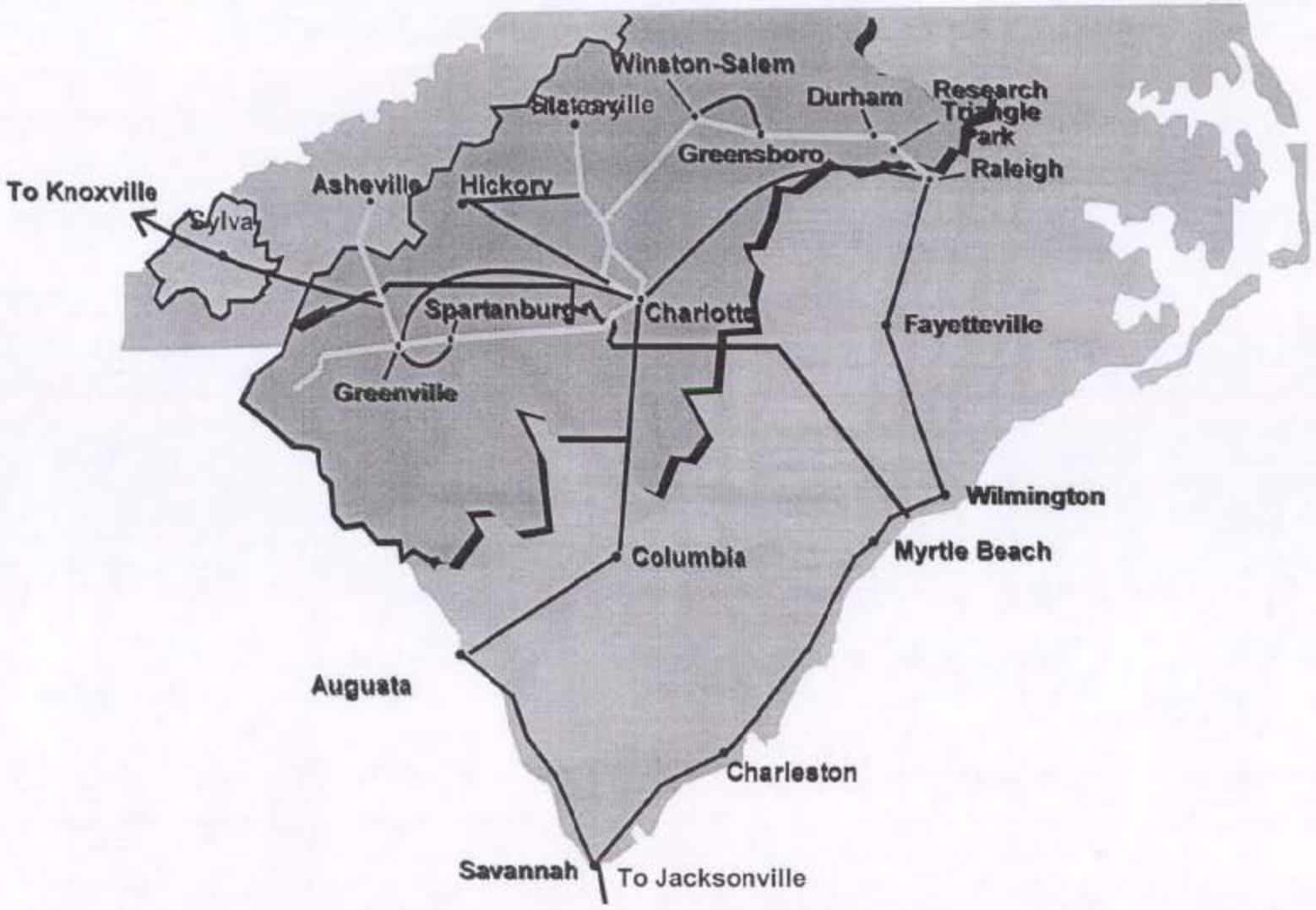
Sincerely,

Henry C. Campen, Jr.

HCCjr/dbm
Attachments

cc: Jordan Goldstein

DukeNet Fiber Network



DukeNet Facts

- DukeNet has spent in excess of $50MM to establish its current network footprint
- DukeNet operates a DWDM/SONET network encompassing approximately 25,000 fiber-miles (2,000 route miles)
- DukeNet operates approximately 120 on-net POPs
- DukeNet acts primarily as a carrier's carrier and its customer segments include: wireless carriers, CLECs, IXCs, and ISPs

Use of DukeNet Infrastructure and UNEs to Service Wireless Carriers